IN THE

Supreme Court of the United States

OCTOBER TERM, 1973
NO. 73-1823

GARY VAN GUNDY, and
RIVERGATE NEWS AGENCY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REASON FOR FILING A REPLY BRIEF

The Petitioners respectfully file this Reply to the Memorandum of the United States in Opposition to Petition for a Writ of Certiorari, pursuant to Rule 24(4) of this Court. Petitioners state that this Reply is "addressed to arguments first raised in the briefs in opposition . . . "

REPLY BRIEF

1. In its Memorandum, the Government argues that Petitioners were not prejudiced by the use of national standards, citing *Hamling v. United States*, ____ U.S. ___, 41 L.Ed.2d 590 as support, and also argues that the Petitioners received the benefits of both the *Memoirs v. Massachusetts*, 383 U.S. 413 and *Miller v. California*, 413 U.S. 15. A more precise analysis indicates that these two arguments of the Government are fully without substance.

After the Petition for Writ of Certiorari was filed in this case, this Court decided *Hamling v. United States*, ____ U.S. ____, 41 L.Ed.2d 590. In *Hamling*, one of the issues this Court addressed itself to was the use of national community standards in the trial court's instructions to the jury. In rejecting the Petitioners claims that the use of national standards prejudiced them because of this Court's holding in *Miller v. California*, 413 U.S. 15, Mr. Justice Rehnquist said that:

> . . . there is no doubt that its *occasional references* to the community standards of the "country as a whole" delineated a wider geographical area than would be warranted by *Miller*, *12 200-ft. Reels of Film*, and our construction of section 1461 herein, *ante*, at ____. Whether petitioners were materially prejudiced by these references is a different question. Certainly the giving of such an instruction does not render their convictions void as a matter of constitutional law. This Court has emphasized on more than one occasion that a principal concern in

> requiring that a judgment be made on the basis of "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group. *Miller v. California, supra,* 413 U.S. at 33; *Mishkin v. New York,* 383 U.S. 502, 508-509 (1966); *Roth v. United States,* 354 U.S. 476, 489 (1957). The District Court's instructions in this case, *including its* reference to the standards of the "country as a whole," undoubtedly accomplished this purpose.

____ U.S. ____ 41 L.Ed.2d at 614-15 (emphasis supplied).

It is thus clear that *Hamling* is not "on all fours" with the facts presented herein. In the trial court below, the instructions centered solely on national standards, whereas the jury instructions in *Hamling* contained mixed references to both local and national community standards. The Court of Appeals for the Fifth Circuit claimed to give the Petitioner the benefit of both the *Roth-Memoirs* standards and the *Miller* standards, 490 F.2d at 77, but gave no support for such a claim. The trial of Petitioners proceeded on a theory of national standards, and the Petitioners were not charged with violating the local standards of New Orleans, Louisiana. Indeed, they were not given an opportunity to present evidence and a defense regarding such standards. There was thus no evidence adduced at trial and present in the record for the Court of Appeals to make a determination that local community standards had been contravened and upon which it could assert that the Petitioners were being given the "benefit" of *Miller.*

A comparison of the "occasional references" in *Hamling* with the homogeneous instructions herein is a comparison of apples and oranges. There were no occasional references here, but references *solely* to national standards. Mr. Justice Rehnquist in announcing this Court's decision in *Hamling* stated:

> A juror is entitled to draw on his *own* knowledge of the views of the average person *in the community or vicinage from which he comes* for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407, 409 (1953); *Schultz v. Pennsylvania R. Co.*, 350 U.S. 573, 525-526 (1956).
>
> * * * * *
>
> The result of the *Miller* cases. . . . as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge *of the community or vicinage from which he comes* in deciding what conclusion "the average person applying contemporary community standards" would reach in a given case.

____ U.S. ____, 41 L.Ed.2d at 613.

As this Court approved in *Miller* Mr. Chief Justice Warren's dissent in *Jacobellis v. Ohio*, 378 U.S. 184, 199, that community standards did not equate with national standards, and as local community standards were first definitively

enunciated by this Court in *Hamling*, then the judgment below cannot stand because the Petitioners were deprived of due process of law because of conviction of a charge not made and on one theory not tired: local standards.

As stated above, Mr. Justice Rehnquist dismissed the "national standards" argument of the petitioner in *Hamling* because the jury instructions contained only non-prejudicial "references" to the "country as a whole":

> . . . we hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction would have materially affected the deliberations of the jury. Cf. *Namet v. United States*, 373 U.S. 179, 190-191 (1963); *Lopez v. United States*, 373 U.S. 427, 436 (1963). Our examination of the record convinces us that such a probability does not exist in this case.

____ U.S. ____, 41 L.Ed.2d at 615. If references to national standards are excised from this case, then there remains nothing on which a jury may base a conviction, and, therefore, *Hamling* requires reversal of the convictions herein.

2. The Court of Appeals below decided that the *scienter* requirement for conviction of the Petitioners had been met. 490 F.2d at 77. Relying on its opinion in *United States v. Thevis*, 484 F.2d 1149, and this Court's opinion in *United States v. Orito*, 413 U.S. 139, the Court of Appeals said that "Defendants' knowledge of the materials' sexual orientation is sufficient." 490 F.2d at 77. This by no means equates to *scienter*, and contrary to the Government's argument, it does not meet the requirements of *Hamling*.

As the Petitioners' Petition for a Writ of Certiorari stated, pp. 34-35 more than a general knowledge of the nature of the materials is required to show the requisite scienter. Also, the Petition pointed out that there was no competent evidence adduced at trial to support even this standard of the Court of Appeals. The Petitioners, apparently, have been borne out in their argument by this Court's decision in *Hamling, supra.*

Mr. Justice Rehnquist, writing of the *scienter* requirement for obscenity convictions under federal law, said:

> "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials." ____ U.S. ____ 41 L.Ed. 2d at 624.

It is clear from a reading of the record in this case that there wasn't a scintilla of evidence that the Petitioners had knowledge of the contents of the materials they distributed, nor that they knew either the character or the nature of the materials. Chief Justice Burger, writing for the majority of this Court in *Miller v. California*, 413 U.S. 15, said that:

> "... no one will be subject to prosecution for the sale of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conconduct ...
>
> * * * * *
>
> "... a majority of this Court has agreed to isolate 'hard core' pornography from expression protected by the First Amendment."

413 U.S. at 27, 29. Yet the Court of Appeals would deem that a general knowledge of the Petitioners that the material was sexual in orientation is a sufficient showing of *scienter!*

This Court has said that sex and obscenity are not synonymous. *Roth v. United States,* 354 U.S. 476. See *Miller v. California,* 413 U.S. 15. This being the case, then to hold that the Petitioner had the requisite *scienter* because he might have known of the materials' sexual orientation violates both the precepts of *Roth* and *Miller* on the one hand, and the tri-partite *scienter* test enunciated in *Hamling.* It is clear that not even one portion of the *Hamling* test has been met, there being no proof adduced at trial. With no showing of *scienter,* then a conviction cannot be had; or if it be had, then it would violate the holding of this Court in *Smith v. California,* 361 U.S. 147, condemning absolute criminal liability in obscenity cases. The only way whereby one might then avoid prosecution would be by engaging in self-censorship, a device scorned by this Court. *Carroll v. Comm'rs. of Princess Anne,* 393 U.S. 175; *Freedman v. Maryland,* 380 U.S. 51; *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, See *Dombrowski v. Pfister,* 380 U.S. 479; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Shelton v. Tucker,* 364 U.S. 479; *Speiser v. Randall,* 357 U.S. 513.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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